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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 472

LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,
Petitioner,

vs.

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Respondent.

PETITION FOR CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

and

SUPPORTING BRIEF.

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Petitioner, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:
W. E. HENDRIX,
R. G. DRAPER.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.



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Statutes Cited.

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American Bar Association Reports, Vol. 33, p. 543; Vol. 34, p. 62; Vol. 35, pp. 624, 627 22
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LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,
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FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Respondent.

PETITION FOR CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, Louise Camp, Administratrix of the Estate of Ervin Camp, deceased, sued respondent, Trustee for the St. Louis-San Francisco Railway Company, in the United States District Court for the Western District of Tennessee, for the wrongful death of Ervin Camp, seeking, under the provisions of the Federal Employers' Liability Act (U. S. C. A., Title 45, Secs. 51-60), to recover as damages the loss sustained by her as widow and by their three minor children (R. pp. 1-8).

In the District Court a jury verdict for $35,000.00 was rendered in favor of petitioner, respondent's motion for a new trial was overruled and judgment for this amount was entered in favor of petitioner (R. pp. 592-3). On appeal to the Circuit Court of Appeals for the Sixth Circuit, that court reversed the case on a single ground—failure to give a special instruction tendered by respondent dealing with the measure of damages—and remanded the case for a new trial (R. pp. 603-16). The opinion of the court appears at page 604 of the record and is reported under the style of **Thompson v. Camp**, 163 Fed. 2d 396.

Camp, a switchman, was injured the night of April 26, 1945, in the switchyards in Memphis, Tennessee, when he alighted from a moving cut of cars that was being "kicked" into a switch, and fell into a hole permitted by respondent to be adjacent to its tracks. There was substantial evidence that respondent was negligent in failing to furnish Camp a safe place to work; in permitting the existence of the hole near its tracks where switchmen had to alight; in failing to light its switchyards properly; and in kicking cars over rough and uneven ground on which switchmen were forced to alight instead of shoving them in so as to enable switchmen to alight from standing cars (R. pp. 128, 165, 187, 223, 243, 300, 315, 375, 399, 407, and passim).

On June 2, 1945, Camp and respondent's claim agent were both informed by Dr. M. B. Hendrix, the regular surgeon of respondent's employees, who was employed by an association of respondent's employees jointly financed and controlled by respondent and its employees, and the physician who attended Camp, that Camp was "OK, he could go back to work" (R. p. 65).

Both Camp and respondent's claim agent relied upon this statement of Dr. Hendrix, and as a result Camp exe-

cuted a release in consideration of the payment to him of $500.00, which approximately covered the wages he would have received during the time lost (R. p. 453).

Thereafter Camp returned to work, but was unable to perform his duties, and on June 17, 1945, collapsed while on duty and died as a result of his earlier injuries (R. p. 521).

Petitioner sought to set aside the release on the ground of mutual mistake, and to recover for the death of Camp caused by respondent's alleged negligence (R. pp. 6, 7).

Receiving the entire case from the District Judge, the jury found, in an advisory capacity on the equitable issue, that the release was executed by mutual mistake, and returned a general verdict in favor of petitioner for $35,000.00 on the common-law issues of liability and damages (R. p. 575). Both aspects of the verdict were approved by the District Judge, who himself found that there was a mutual mistake sufficient to avoid the release (R. pp. 592-3).

The statement of the case made by the Circuit Court of Appeals in its opinion is accurate. That court, agreeing with the District Judge that the release should be avoided by reason of mutual mistake, found that respondent was liable to petitioner and that the jury was correctly instructed upon all questions of liability. It reversed on the sole ground that the District Judge failed to read to the jury a special instruction on the measure of damages tendered by respondent under the following circumstances:

At the close of the evidence respondent presented a written request that the Court instruct the jury:

> "Defendant's Special Request No. 2.
>
> "Should you find the plaintiff is entitled to damages, it becomes my duty to charge you how to determine

those damages. The damages are limited to such amount as you may deem proper for conscious pain and suffering suffered by the plaintiff's intestate, Ervin Camp, and to such loss as results to the plaintiff and their children because they may have been deprived of a reasonable expectation of pecuniary benefits by the death of said Ervin Camp. In determining the amount of such pecuniary benefits of which they may have been deprived you may take into consideration age, health, expectancy of life of the deceased, his earning capacity, his character, his mode of treatment towards his family and the amount he contributed from his earnings to their support. In determining the amount of pecuniary benefit which the plaintiff and her children may have lost you may not include any amount as contributions which the children would have received after they have attained the age of twenty-one years since it is not presumed that they would receive any pecuniary benefits from the deceased thereafter. You should also take into consideration the fact that all persons do not live to the age of expectancy, that this is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary and that the reasonably to be expected contributions may vary or diminish in the future.

"After you have determined the amount of damages under these rules, you should diminish the same for any contributory negligence which you find the said Ervin Camp to have been guilty of should you so find, the damages being diminished in accordance with the rules I have heretofore given you.

"And finally, it is your duty in determining the amount of damages, if any, due the plaintiff to reduce the same to their present cash value since it is considered that a lump sum of money in hand at the present time is worth more than a sum of money payable over a period of future years. It is accordingly your duty to reduce such damages to their estimated present cash value" (R. pp. 569-70).

The Court, as required by Rule 51 of the Federal Rules of Civil Procedure, informed counsel of its proposed action upon this request, saying:

> "The defendant's special request number 2, on the question of damages, I believe will be amply covered in the Court's general charge, and therefore the same is refused" (R. p. 537).

No objection or exception was made at that time by counsel for respondent, who merely stated:

> "I take it we can reserve decision as to that until the general charge is given, to see whether it is given. It is impossible to tell, in fact, until it is given" (R. p. 537).

The District Judge in the general charge instructed the jury:

> "You may take into consideration in estimating the damages the conscious pain and suffering, mental and physical, of the plaintiff's decedent, Ervin Camp, which he experienced during the time intervening between the time he was injured and the time of his death, if you find from a preponderance of the evidence that he experienced any conscious pain and suffering, mental or physical, during that time.
>
> "Further, in estimating the damages recoverable you should allow the plaintiff such sum as in your judgment, under the proof will be just and reasonable compensation for the pecuniary loss plaintiff has sustained, if any, by reason of the death of the said decedent, Ervin Camp. In estimating the present cash value of plaintiff's pecuniary loss, which is the amount you award, you should consider the age of the decedent, together with his capacity for earning money, his disposition to contribute, to care for, and to furnish his wife money, as shown by the evidence. You should consider in arriving at the amount of your verdict decedent's expectancy as shown by the mortality tables, and also the expectancy of the life of plaintiff, as go-

ing to the question of how long she might reasonably have expected to receive financial aid and support from her deceased husband" (R. pp. 561-62).

After the giving of the general charge the following occurred with respect to requested instruction number 2:

> Counsel for Defendant: "We except to the charge on damages insofar as it failed to embody certain portions of the defendant's special request number 2 to the effect that the jury should not consider or does not have to consider that a man will live to his full expectancy, and that it should take into consideration that he may not, particularly in a hazardous occupation; they should take into consideration every element, such as the fact that the plaintiff might remarry, or that the—that a child may not live to maturity, or that she may die before her expectancy and other elements of a like nature.
>
> Mr. Armstrong: I am willing for you to read his special instruction on that.
>
> The Court: That is the purpose of this little conference right at this time, to call the attention of the Court to anything that resembles error in the Court's charge. You are excepting; do you concede to the rereading?
>
> Mr. Turner: No, I am excepting, and I am not agreeing that certain portions of the charge or certain other submitted charges may be now read or reread, except to state my exception that it over-emphasizes the matter of damages to the plaintiff here. I am entitled to that exception" (R. pp. 568-69).

The Circuit Court of Appeals held that the District Judge committed prejudicial error in failing to give respondent's requested instruction number 2, and on this single ground reversed the case and remanded for a new trial (R. pp. 615-16).

STATEMENT AS TO BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended (28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered August 11, 1947 (R. p. 603). A seasonably filed petition for rehearing (R. p. 617) was overruled by the court on October 7, 1947 (R. p. 643).

QUESTIONS PRESENTED.

The Circuit Court of Appeals reversed the judgment of the District Court for alleged error in failing to give an instruction requested by respondent with respect to the measure of damages.

Important questions raised by this action of the Circuit Court of Appeals, which should be settled by this Court, are:

I.

Under Rule 51 of the Federal Rules of Civil Procedure, what is the correct practice in regard to objecting to the charge of the Court and the Court's failure to give a requested instruction, and did respondent properly object to the failure of the District Judge to give special instruction number 2?

II.

Whether the Circuit Court of Appeals failed properly to apply in a civil case the "harmless error statute" (Sec. 269 of the Judicial Code as amended) by reversing the judgment of the District Court for a technical error not affecting the substantial rights of the parties?

A subsidiary question presented by the record is:

III.

Was the District Court in error in failing to give respondent's special instruction number 2?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Rule 51 of the Federal Rules of Civil Procedure imported a new feature into the federal practice by permitting a party at the close of the evidence to "file written requests that the court instruct the jury on the law as set forth in the requests" and by requiring the court to "inform counsel of its proposed action upon the requests prior to their arguments to the jury." That Rule further precludes a party from assigning "as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

The scope and application of Rule 51 has not been the subject of opinion by this Court. The Circuit Court of Appeals for the Sixth Circuit erroneously applied this Rule by reversing for failure to give a requested instruction, although counsel for respondent had rejected an offer of the court to read this instruction and had thus in effect withdrawn it. Moreover, counsel did not distinctly state the matter to which he objected and the grounds of his objection; this could only have been done by redrafting the requested instruction, omitting all features of it which had been covered in the general charge, retendering it as revised and excepting to any refusal to grant the retendered request. This error should be corrected and this important question of federal practice and procedure, arising in innumerable trials, should be settled.

2. The Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the District Court for a technical error not affecting the substantial rights of the parties. It thus failed to apply the "harmless error statute" (Sec.

269 of the Judicial Code as amended, 28 U. S. C. A. Sec. 391) in a civil case in a manner consonant with the decision of this Court in **Kotteakos v. United States**, 328 U. S. 750 (1946). As to the construction of the "harmless error statute," the decisions of this Court in civil cases do not fit into a coherent pattern and there is confusion and contradiction among the Circuit Courts of Appeals. See authorities cited in brief, infra, pp. 24-27.

The clarification of the application of the "harmless error statute" in civil cases, specifically pretermitted by this Court in the **Kotteakos case**, is a matter of highest importance to orderly procedure and substantial justice. The instant case offers an opportunity to this Court to undertake such clarification and to settle the confusion and contradiction in the Circuits.

PRAYER.

Wherefore, your petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals of the Sixth Judicial Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled and numbered on its docket "Frank A. Thompson, Trustee for the St. Louis-San Francisco Railway Company, Debtor, Defendant-Appellant, v. Louise Camp, Administratrix of the Estate of Ervin (Irving) Camp, Deceased, Plaintiff-Appellee, No. 10362," to the end that said case may be reviewed and determined as provided in Section 240 (a) of the Judicial Code as amended (28 U. S. C. A., Sec. 347), and that the judgment of the Circuit Court of Appeals for the Sixth Circuit be reversed by this Honorable Court and the judgment of the District Court of the Western Division of the Western District of Tennessee be affirmed, and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Petitioner, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:

W. E. HENDRIX,
R. G. DRAPER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

No formal opinion was delivered by the District Court (see Record pp. 589-91). The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed August 11, 1947, and appears at pages 604-16 of the record. It is reported under the style of **Thompson v. Camp**, 163 Fed. 2d 396. Upon denial of the petition to rehear, October 7, 1947, the Circuit Court of Appeals rendered no opinion.

JURISDICTION.

See Statement as to Basis of Jurisdiction, Petition, supra, p. 7.

STATEMENT OF THE CASE.

See Summary Statement of Matters Involved, Petition, supra, pp. 1-6.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Sixth Circuit erred in reversing the judgment of the District Court and remanding the cause for a new trial for alleged error of the District Court in failing to give respondent's requested instruction number 2.

This was error for

1. Respondent, under Rule 51 of the Federal Rules of Civil Procedure, did not properly object to the failure of the District Court to give requested instruction number 2.

2. There was no error by the District Court in failing to give such requested instruction.

3. The failure of the District Court to give such requested instruction was, at worst, technical error not substantially affecting the rights of the parties and no ground for reversal under the "harmless error statute" (Sec. 269 of the Judicial Code as amended).

ARGUMENT.

UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHAT IS THE CORRECT PRACTICE IN REGARD TO OBJECTING TO THE CHARGE OF THE COURT AND THE COURT'S FAILURE TO GIVE A REQUESTED INSTRUCTION, AND DID RESPONDENT PROPERLY OBJECT TO THE FAILURE OF THE DISTRICT JUDGE TO GIVE SPECIAL INSTRUCTION NUMBER 2?

Rule 51 of the Federal Rules of Civil Procedure provides:

> "Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

That part of the Rule obligating the District Court to inform counsel of its proposed action upon submitted requests, prior to argument to the jury, is a new feature imported into federal practice. This Court has not authoritatively construed its scope or effect. It is our submission that notwithstanding any indication of proposed action, the District Judge is free until the time the case is submitted to the jury to change or supplement his charge,

and that exception can only be taken to his final action. See **Palmer v. Miller,** 145 Fed. 2d 926 (C. C. A. 8, 1944); **Terminal R. Ass'n of St. Louis v. Staengel,** 122 Fed. 2d 271 (C. C. A. 8, 1941), Cert. den. 314 U. S. 680. In the latter case, the Circuit Court of Appeals for the Eighth Circuit resolved the difficulty presented by argument of counsel to the jury on the assumption that the law would be declared in one way by the judge, when in fact it was later declared in another way, by holding that under such circumstances counsel should call the attention of the court to the situation and request the right to reargue—a sound view which we urge upon this Court.

Counsel for respondent in the instant case rejected the offer of the court to give requested instruction number 2 after the jury was charged, and in effect asserted a claimed right to stand on his exception (R. pp. 568-69), thus in effect withdrawing this requested instruction. Respondent therefore cannot complain of the court's action in this respect, because the court had a right then to give the instruction and was willing to do so, and only failed to take this action because of the objection of respondent. An opinion by the Court dealing with this subject would clarify the federal practice.

Moreover, Rule 51 precludes a party from assigning as error "the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Counsel for respondent did not object to the court's failure to give requested instruction number 2; he objected to the meagerness of the charge in that it did not embody certain portions of the requested instruction number 2. As pointed out by the Circuit Court of Appeals, many of the features of this requested instruction were covered by the general charge:

> "Damages in such a case 'should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased,' and 'that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only.' * * * This general rule was covered by the Court's charge. In addition, the Court charged that in estimating the present cash value of appellee's pecuniary loss, the jury should consider the age of the decedent, his capacity for earning money, his expectancy as shown by the mortality tables and also the expectancy of the widow, and his disposition to contribute, to care for and to furnish his wife money" (R. p. 614).

A substantial part of requested instruction number 2, therefore, having been covered in the general charge, the court cannot be put in error for refusing to accept the entire instruction, because a party cannot assign as error the refusal of an instruction to which he has not a right to the full extent, as stated and in its precise terms. **Fowler v. Brantly,** 14 Peters 318 (1840); **Beaver v. Taylor,** 93 U. S. 46 (1876); **Rio Grande Western Ry. Co. v. Leak,** 163 U. S. 280 (1896); **Chicago, G. W. R. Co. v. Robinson,** 101 Fed. 2d 994 (C. C. A. 8, 1939), cert. den. 307 U. S. 640.

The only way that proper objection could have been made would have been for requested instruction number 2 to have been redrafted, those parts of it which had been covered by the general charge eliminated and the remainder retendered, and if the retender was refused, then objection made to the refusal to give the revised instruction.

Counsel for respondent, having failed to do this and having rejected an offer of counsel for petitioner and the court to have his requested instruction number 2 given, and having not distinctly objected—having in effect withdrawn his

request—failed to comply with the Rule. Here, too, it is important that the federal practice be spelled out by this Court.

It Was Not Necessary for the Matters Dealt With by Requested Instruction Number 2 Which Were Not Covered by the General Charge to Be Explained to the Jury.

The Circuit Court of Appeals found that only two of the propositions contained in this requested instruction were not covered by the general charge. To use the language of that Court:

> "Appellant's Special Request No. 2 asked that the jury be instructed to also consider decedent's health, that all persons do not live to the age of expectancy, that such is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary, and that the reasonably to be expected contributions may vary or diminish in the future * * *" (R. p. 614).

This portion of the instruction deals with matters so obvious and so peculiarly within the knowledge of a jury that it would have been a work of supererogation specifically to call them to the jury's attention. As was said by Judge Sanborn in **Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.**, 114 Fed. 133 (C. C. A. 8, 1902), these facts were "a part of the common knowledge and experience of mankind, and it is not error to refuse to insert in a charge to a jury truisms which are a part of the common knowledge and experience of all men who have arrived at years of discretion" (p. 144).

The only other phase of this special instruction that the Circuit Court of Appeals found the general charge did not deal with was that part which told the jury that it should

not include any contributions which the children would have received after they attained the age of twenty-one. The general charge did not refer to the children, but limited the recovery to contributions reasonably to be expected by the wife. There is nothing in the complaint and there is nothing in the record to suggest that there was claimed as an element of damage any contribution the decedent might in the future make to any child after that child reached maturity. The issue was not in the case. On this subject the Circuit Court of Appeals said:

> "Although the children are not specifically mentioned, the charge refers several times to the pecuniary loss of the 'plaintiff.' Plaintiff was not the widow individually, but was the widow as Administratrix of her husband's estate" (R. pp. 615-16).

It is true that in that paragraph of the charge dealing with damages the court said:

> "Further, in estimating the damages recoverable you should allow the plaintiff such sum as in your judgment, under the proof will be just and reasonable compensation for the pecuniary loss plaintiff has sustained, if any, by reason of the death of the said decedent, Ervin Camp" (R. p. 562).

It is also true that the plaintiff was Mrs. Louise Camp, Administratrix. However, in defining "the pecuniary loss plaintiff has sustained" the court further said:

> "You should consider the age of the decedent, together with his capacity for earning money, his disposition to contribute, to care for, **and to furnish his wife money**, as shown by the evidence." (Emphasis supplied. R. p. 562.)

It seems entirely clear from this that the court submitted to the jury as an element of damage only the support furnished by the decedent to his wife, and in effect elimi-

nated any contributions he might make to his children either as adults or minors. It seems difficult to put any other construction on this charge. Moreover, the exception of counsel for respondent was not to the refusal to give the requested instruction but to the refusal to embody certain portions of it in the general charge. There is in that exception no objection of any kind to the failure of the general charge to state that contributions to the children could be considered only during their minority. In this view, therefore, the error in the general charge as to the measure of damages, if any, was an error against the petitioner in limiting the contributions to those made to the wife and excluding as an element any contributions made to the children even during minority.

WHETHER THE CIRCUIT COURT OF APPEALS FAILED TO APPLY IN A CIVIL CASE THE "HARMLESS ERROR STATUTE" (SEC. 269 OF THE JUDICIAL CODE AS AMENDED) BY REVERSING THE JUDGMENT OF THE DISTRICT COURT FOR A TECHNICAL ERROR NOT AFFECTING THE SUBSTANTIAL RIGHTS OF THE PARTIES?

Section 269 of the Judicial Code as amended (28 U. S. C. A., Sec. 391; Act of Feb. 26, 1919, c. 48, 40 Stat. 1181) provides:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

A Technical Error, Not Affecting Substantial Rights, Formed the Basis of Reversal by the Circuit Court of Appeals.

The requested instruction of respondent refused by the District Court dealt only with certain elements of the measure of damages (R. pp. 569-70; the request is set out supra, pp. 3-4). Obviously the refusal of the instruction could not have had any influence upon whether the jury found for petitioner or respondent. The only influence the refusal could possibly have had would have been on the amount of the verdict. It seems clear, however, that the amount of the verdict is entirely consonant with what it might have been if the jury had made its finding after the requested instruction had been given. The District Judge having had his attention again brought to this subject by the motion for new trial (R. pp. 577-88) approved the verdict (R. p. 591). The Circuit Court of Appeals nowhere in its opinion intimates that the verdict is in any wise excessive or would be excessive if the charge had been meticulously exact. Petitioner's decedent suffered intense physical and mental pain for a period of approximately six weeks. It would seem a conservative statement to say that this suffering alone prior to his death would warrant a verdict of at least $10,000.00. This leaves only $25,000.00 of the verdict to be attributed to the damage suffered by his dependents. At the time of his death Camp was thirty-three years of age, and, before his injury, was in perfect health. Decedent's expectancy was 33.2 years and his widow's expectancy 35.3 years (R. p. 285). At the time of decedent's death one of his children was between twelve and thirteen years of age and one between nine and ten, so that there remained for them approximately nine and twelve years of minority (R. p. 58). There was a posthumous child only five months old at the time of the trial (R. p. 58). Decedent himself was frugal and abstemious (R. p. 59). His earnings averaged

about $3,000.00 a year (R. p. 59), and all of that amount was necessary for the support of his wife and only two children (R. p. 59). The cost of a life annuity of $3,000.00 per annum with no return value for a man forty years of age is $74,520.00 (R. p. 287). When all factors are considered—decedent's expectancy and his widow's longer expectancy; his earnings; the cost of an annuity; the fact that he would be obligated to support one minor child for nine, another for twelve, and the third for twenty-one years—it seems clear that even a jury which gave full weight to the fact that decedent's obligation to support his children ceased at their majorities, and to the uncertainties of life, would have been well warranted in awarding damages equal to the amount found in this case ($35,000.00).

There is therefore presented by this record a case where, it is submitted, it affirmatively appears that the refusal of the District Court of respondent's requested instruction was harmless error.

The uniform refusal of courts to reverse even though there is affirmative error in the charge on damages, when it plainly appears the verdict is not excessive, is bottomed upon the fact that in such cases the error is necessarily harmless. **Coast S. S. Co. et al. v. Brady,** 8 Fed. 2d 16 (C. C. A. 5, 1925); **United Verde Copper Co. v. Jordan,** 14 Fed. 2d 299 (C. C. A. 9, 1926); **Overland Const. Co. v. Sydnor,** 70 Fed. 2d 338 (C. C. A. 6, 1934); **Philadelphia & W. C. Traction Co. v. Kordiyak,** 171 Fed. 315 (C. C. A. 3, 1909); **Atwater v Whiteman,** 41 Fed. 427 (D. Minn., 1890); **Albert Miller & Co. v. Wilkins,** 209 Fed. 582 (C. C. A. 7, 1913); **Chicago House Wrecking Co. v. Birney,** 117 Fed. 72 (C. C. A. 8, 1902), cert. den. 187 U. S. 642.

Certainly, this record does not present a case where such refusal can be considered as affirmatively prejudicial.

Even if we are mistaken in our insistence that there is an affirmative showing that the error was harmless because the concededly proper elements of damage justified the jury's verdict, it can hardly be contended that there is, contrariwise, an affirmative showing that the amount of the verdict was attributable in slightest degree to the failure to give the requested instruction. There was no affirmative inclusion of any improper elements of damage. At most there was a failure affirmatively to exclude certain elements not proper to be considered. In the event that a jury is told to consider improper elements of damage and the resulting verdict is so large as to indicate that these elements were considered, that may no doubt make an affirmative showing of prejudice. It is conceivable that when a proper request for the exclusion of improper elements of damage is refused, and the resulting verdict is so large as to indicate that the amount would have been less if these elements had been excluded, this may be considered an affirmative showing of prejudice. In the instant case, however, the verdict is entirely consistent with the consideration by the jury of only the proper elements of damage and with its rejection of all improper elements. The Circuit Court of Appeals in its opinion in this case, finding error in the refusal of the District Court to give a requested charge, mechanically characterized that error as "prejudicial" (R. p. 616). While the court does not refer to any "presumption" of prejudice in reaching its conclusion, a basis for its finding can be found only in its indulgence of such a presumption, as it has done, in terms, in other recent cases. See **Evansville Container Corp. v. McDonald**, 132 Fed. 2d 80 (C. C. A. 6, 1942), in which, referring to an erroneous charge, the court said that "there is a presumption that it was prejudicial" (p. 85); **Majestic v. Louisville & N. R. Co.**, 147 Fed. 2d 621 (C. C. A. 6, 1945), where the court said that "in jury trials erroneous rulings embodied in instructions are presumptively injurious and furnish grounds

for reversal unless it affirmatively appears they were harmless" (p. 627).

A technical error, not affecting substantial rights, was therefore the basis of reversal by the Circuit Court of Appeals of the judgment of the District Court, and its action squarely raises the important question presented here as to the proper scope and construction of the "harmless error statute" in a civil case.

This Court Has Recently Settled the Construction of the "Harmless Error Statute" in Criminal Cases.

Recognizing the confusion and contradiction among the Circuit Courts of Appeals in construing and applying the "harmless error statute," this Court in **Kotteakos v. United States**, 328 U. S. 750 (1946), for the first time went into the legislative history of the Act and fully construed it as applied to a criminal case.[1] It rejected both the view that

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1 Exhaustive study of the legislative history of the "harmless error statute" discloses that this Court, in the **Kotteakos case**, considered that history in detail. Discussion in that case, however, was focused upon the purpose of the "harmless error statute" as a device for eliminating reversals for technicalities in criminal cases. The legislative history discloses that the purpose of the statute was to emasculate harmless error in civil as well as in criminal cases. This is fully disclosed by the reports of the committees of the American Bar Association which originally proposed the legislation. Cf. **American Bar Association Reports**, Vol. 31, p. 543; Vol. 33, p. 543; Vol. 34, p. 62; and the brief filed by that Association before the Committee on the Judiciary, House of Representatives, which read in part:

> "So far as procedure in appellate courts is concerned, what we wish to accomplish is this: That in consideration in an appellate court of a writ of error, judgment should be rendered upon the merits without permitting reversals for technical defects in the procedure below, and without presuming, as many courts now do, that if there has been a violation in some particular of some rule of law, that violation has been prejudicial to the result. The effect of the first section of the bill that is now before you is to enact that the presumption shall be that the decision of law was real, and that if it was erroneous in some detail the error did not affect the result. * * * It should be for the defeated party to satisfy the appellate court that the ruling was actually prejudicial to him on the merits." **Reforms in Legal Procedure**, Hearings Before the Committee on the Judiciary, House of Representatives, 62nd Cong., p. 40 (1912); **American Bar Association Reports**, Vol. 35, pp. 624, 627.

That Congress was equally desirous of correcting civil abuses is evidenced by H. R. Rep. No. 611, 62d Cong., 2d Sess., Vol. 3. In this report

there is a presumption that all error is harmless, and the view that there is a presumption that all error is prejudicial, holding that "the general object was simple, to substitute judgment for automatic application of rules" (p. 760). Technical errors are to be disregarded unless the complaining party shows they have affected his substantial rights, but errors whose natural effect is to affect a litigant's substantial rights place upon the one claiming under the Act the burden of sustaining the verdict. If the Court can be sure that the error did not influence the jury or had only a slight effect, the verdict and judgment should stand.

Put another way, when the error is merely technical this does affirmatively show without the aid of any presumption that the substantial rights of the parties were not affected; where the substantial rights of the parties are affected, this affirmatively shows, without the aid of any presumption, that the error was prejudicial.

The **Kotteakos case** is confined both in its holding and in its discussion to the effect of the statute in criminal cases. "The statute in terms makes no distinction between civil and criminal causes. But this does not mean that the same criteria shall always be applied regardless of this difference" (p. 762). No civil case is either cited or referred to in the opinion. There is the same confusion in civil cases as existed in criminal cases before the opinion in the **Kotteakos case**, and the same need for clarification in such cases; indeed, it seems to be a permissible inference from

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Hon. John W. Davis, Chairman of the Committee on the Judiciary of the House of Representatives, pointed out the need for legislation as follows:

> "* * * in (R. R. Co. v. O'Reilly, 158 U. S. 334) the Supreme Court holds that an error is presumed to be prejudicial until the contrary appears, and in (Cunningham v. Springer, 204 U. S. 647) that an error is presumed to be harmless until the contrary is made to appear. It is the purpose * * * of the present bill to enact * * * that in the consideration in an appellate court * * * judgment shall be rendered upon the merits * * * without presuming that any error which may appear has been of necessity prejudicial to the complaining party."

the opinion in the **Kotteakos case** that the Court limited the discussion to criminal cases because it preferred to wait until a typical civil case was presented in which there could be further clarification and application of the statute.

Supreme Court Cases.

"The divergent views which have been expressed in the various circuit courts of appeals as to the effect of the Act of 1919" were noticed by this Court in **United States v. River Rouge Improvement Co.**, 269 U. S. 411 (at p. 421) (1926), which was the first case to be decided after the passage of the Act. The Court added "that since the passage of this act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties" is ground for reversal "unless it appears from the whole record that it was harmless" (p. 421). The inclusion of the words "as well as before" seemed to some to intimate that the Act had not changed pre-existing law. While in that case the Court did not refer to presumptions, it did cite **Fillippon v. Albion Vein Slate Co.**, 250 U. S. 76 (May 19, 1919), which was decided before the passage of the Act and in which it had been stated that "in jury trials erroneous rulings are presumptively injurious" (p. 82).

The first case decided after the passage of the Act which which mentioned the subject of presumption was **Berger v. United States**, 295 U. S. 78 (1935), in which the purpose of the Act was declared to be "to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed" (p. 82). The Court returned to the subject in **McCandless v. United States**, 298 U. S. 342 (1936), and stated that the Act did "not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it **affirmatively** appears from the whole

record that it was not prejudicial" (pp. 347-48). There is no mention in the **McCandless case** of a presumption, but that case does again cite with approval the **Fillippon case**, in which before the passage of the Act this presumption was distinctly enunciated.

The interpretation placed by the Circuit Courts of Appeals upon the **Berger** and **McCandless** cases has probably been the reason for the confusion and contradiction among those courts. They have apparently treated the **Berger case** as enouncing that there is a presumption that error is harmless, and the **McCandless case** as holding the contrary. In any event, the **McCandless case** has been frequently cited as authority that error is presumed to be prejudicial, no matter what the nature of the error, and most of the Circuit Courts of Appeals have treated the question as one of presumption, a basis for decision now rejected by this Court in the **Kotteakos case.**

Confusion and Contradiction Among Circuit Courts of Appeals.

There have been cited above (p. 21) recent cases from the Sixth Circuit holding that every error is presumed to be prejudicial. In both of these cases the **Fillippon case** was cited and relied upon.

Striking illustrations of the effect of the construction placed by the Circuit Court of Appeals on the **McCandless case** are found in the change of attitude of the Eighth and Ninth Circuits after the decision of that case. The Eighth had said, in **Goldstein v. United States**, 63 Fed. 2d 609 (1933), that since the enactment of the harmless error statute "an error is not presumed to be prejudicial" (p. 614), and had added, in **Valley Shoe Corp. v. Stout**, 98 Fed. 2d 514 (1938), that "since the enactment of that statute the rule of this Court has been that unless an appellant can

show from the entire record the denial of some substantial right, there will be no reversal" (p. 520). After the opinion in the **McCandless case** the Eighth returned to the subject in **Fort Dodge Hotel Co. v. Bartelt,** 119 Fed. 2d 253 (1941), saying that since the enactment of the statute "this Court * * * has ruled that unless an appellant can show from the entire record the denial of some substantial right, there will be no reversal." And added: "The Supreme Court has stated the rule differently in McCandless v. United States * * *" (p. 259).

The Ninth Circuit, from which the **McCandless case** had gone to this Court (74 Fed. 2d 596), in **Lynch v. Oregon Lumber Co.,** 108 Fed. 2d 283 (1939), stated that prior to the passage of the "harmless error statute" "the established rule was that the burden was on appellant to show error, and that error shown, was presumed to be prejudicial unless the contrary was affirmatively shown by the record" (p. 285). It further stated that in the **McCandless case** it had held that the Act changed the previous rule, but that this Court had held in **United States v. River Rouge Improvement Co.,** supra, "that the amendment had not changed the rule that a presumption of prejudice arose upon a showing of error" (p. 286), but that in holding otherwise it had followed the **Berger case,** and concluded:

> "Since McCandless v. United States, 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205, is latest in time, it must be taken as overruling Berger v. United States, supra, and as establishing the rule that if error is shown, then there should be reversal 'unless it **affirmatively** appears from the whole record that it was not prejudicial' " (p. 286).

The First and Fifth Circuits categorically state the rule in terms of generalized presumption, holding that there is a presumption that error is prejudicial. See **Gaillard v. Boynton,** 70 Fed. 2d 552 (C. C. A. 1, 1934), and **Farris**

v. **Interstate Circuit, Inc.**, 116 Fed. 2d 409 (C. C. A. 5, 1941).

The conflict among the other Circuits centers upon the question as to whether the burden is upon the appellant to show that an error is prejudical, or upon the appellee to show that it is harmless. Cf. **United States v. Johnson,** 129 Fed. 2d 954 (C. C. A. 3, 1942), and **Andrews v. United States,** 108 Fed. 2d 511 (C. C. A. 4, 1939). But see **Worcester v. Pure Torpedo Co.,** 127 Fed. 2d 945 (C. C. A. 7, 1942). The Tenth Circuit, on the other hand, has expressed conflicting views. See **Little v. United States,** 73 Fed. 2d 861 (C. C. A. 10, 1934) and **Scritchfield v. Kennedy,** 103 Fed. 2d 467 (C. C. A. 10, 1939).

Confusion Should Be Clarified in Civil Cases as Was Done by Kotteakos Case in Criminal Cases.

We rely upon the confusion and contradiction among the Circuits in civil cases, and upon their categorical statement that the test is a generalized presumption—a test rejected by this Court in the **Kotteakos Case**—as a basis for the granting of the writ in the instant case. The Sixth Circuit in reversing this case must necessarily have applied its rule that error is presumed to be prejudicial. Indeed, it is difficult to see how there could have been any reversal except by such "an automatic application of rules." It seems fairly "sure that the error did not influence the jury, or had but very slight effect" (328 U. S. at p. 764), because the verdict could be firmly based upon correct elements of damage. Thus no substantial right of the respondent could have been invaded; the error, if any, was technical and could only be the basis for reversal if a presumption is indulged that it influenced the result. A typical case, therefore, is presented in which to illustrate the effect of the statute "to substitute judgment for automatic application of rules"—a case in which

the error, if any, is "technical" and is not such that "its natural effect is to prejudice a litigant's substantial rights" (p. 760).

Not only the application but the construction of the statute in civil cases, a question which was reserved in the **Kotteakos Case**, should be decided. As was intimated in that case, the attitude toward harmless error may well be more liberal in a civil than in a criminal case.[2] Indeed, in a civil case there would seem to be no reason why, when a clearly correct result had been obtained, there should be any necessity for reversal. In the instant case it is not necessary to go that far. Concededly, under the record as it now stands a verdict for the plaintiff was proper; even the amount of the verdict is not subject to attack as excessive under a technically correct charge. Obviously, under such circumstances the error, if any, was harmless.

WAS THE DISTRICT COURT IN ERROR IN FAILING TO GIVE RESPONDENT'S SPECIAL INSTRUCTION NUMBER 2?

Although not urged as an important question justifying the granting of the petition for certiorari herein, there is necessarily presented by the record the question of whether or not there was **any** error in the action of the District Court in refusing respondent's requested instruction number 2.

To save the rights of petitioner with respect to this question, if it becomes material, it is briefly submitted:

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2 As to the distinction between criminal and civil cases and the possibility of a different rule in the two classes of cases, see **Glasser v. United States**, 315 U. S. 60 (1942); **Johnson v. United States**, 318 U. S. 189 (1943); **Bollenbach v. United States**, 326 U. S. 607 (1946); **Bihn v. United States**, 328 U. S. 633 (1946). (Decided before the **Kotteakos case.**) See **Fiswick v. United States**, ... U. S. ..., 91 L. Ed. 183 (1946); **Ballard v. United States**, ... U. S. ..., 91 L. Ed. 195 (1946); **United Brotherhood v. United States**, ... U. S. ..., 91 L. Ed. 705 (1947). (Decided after the **Kotteakos case.**)

The requested instruction itself was not technically accurate and its refusal was justified on this ground. Reference therein to reduction of "the amount of the damages" to "their present cash value" confused "damages" with "earnings" and rendered the request inaccurate (R. pp. 569-570). Reference therein to future variation of petitioner's decedent's earnings and contributions (R. p. 570) dealt with the possibility of their **diminishing**, when an accurate charge should have dealt likewise with the possibility of their **increasing**.

CONCLUSION.

Because of the importance of the questions presented, especially that involving the application and construction of the "harmless error statute" in civil cases and the clarification of conflict among the Circuits, it is submitted that the petition should be granted, and the erroneous action of the Circuit Court of Appeals for the Sixth Circuit corrected.

Respectfully submitted,

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Petitioner, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:

W. E. HENDRIX,
R. G. DRAPER.